No. 11707

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL CASUALTY COMPANY, a corporation,
Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA, for the use of M. C. SCHAEFER, an individual doing business as CONCRETE CONSTRUCTION COMPANY,
Plaintiff and Appellee,

A. J. GOERIG and CLYDE PHELP, individuals and co-partners,
Defendants and Cross Appellants,

SAM MACRI, DON MACRI and JOE MACRI, individuals and co-partners,
Defendants and Cross Appellants.

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PETITION FOR REHEARING

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

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ELWOOD HUTCHESON
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Appellant, Continental Casualty Company, respectfully petitions the above entitled court for a rehearing herein.

The amount involved in this litigation is extremely large; the questions are very important; and the issue has not previously been decided by this court. There are, in fact, only a few cases in which this question has been previously adjudicated by any court. With the utmost respect for the learning and ability of the Chief Judge of this court who wrote the opinion and the concurring Judges, we sincerely believe and respectfully submit that, at least as to appellant, Continental Casualty Company, the opinion is fundamentally erroneous and unsound, and the case, at least as to this appellant, should, we believe, be given further consideration by this court.

The only portion of the opinion dealing with this question of Continental's liability, if any, to Schaefer is subdivision D consisting of only three rather short paragraphs (only two paragraphs aside from statutory quotations) on pages 6 and 7. The decision holding Continental liable for the large sum of $56,764.97 plus interest and costs is apparently predicated solely and entirely upon the theory that a *"new agreement"* was entered into between the Macris and Schaefer for the performance of extra work of which the reasonable value was said sum. This so-called "the new agreement" is referred to at least twice therein, and two of the principal cases relied upon by us are

thought to be distinguished solely on the ground that in those cases "there was no agreement," etc.

But here there was no new agreement between the Macris and Schaefer. The evidence wholly fails to substantiate any such theory or ground of decision. Schaefer alleged it, but failed to prove it. Even the district court expressly held that there was no such new agreement.

As pointed out at page 22 of our opening brief, the district court in his opinion stated:

> "In short, the court finds that Mr. Macri breached the subcontract, or those portions of them to be performed by him, in the particulars which I have designated; that his breach was willful and negligent, and that was true both as to the character of excavations and fine grading and time it was done, the amount and quality of lumber and the time it was furnished, and that this breach of Mr. Macri's part was a continuing breach, which continued and existed and persisted throughout the entire performance of this contract until the very end of its performance by Mr. Schaefer. . . .
>
> "*However, the court cannot find under the record here that there was a meeting of the minds, or an express contract* that Mr. Schaefer was to continue to complete the work and do what fine grading was required by the defective conditions of the excavations, and was then to be paid for the reasonable value of all of his costs. *I think such a finding would be inconsistent with the other testimony in the case here, and with the conduct of Mr. Schaefer. He refused specifically to take over the fine grading and excavating when Mr. Macri, according to the testimony, offered to turn it over to him.* He continued to complain. It's hard to conceive how he would have cause for complaint if he

was to get paid for everything anyway, but he continued to complain, and I think *his conduct isn't consistent with the meeting of the minds and an express contract that Mr. Macri was to pay for the fair value of the services.*" (R. 2213).

Clearly, there could not be any new agreement between the parties unless there was a meeting of the minds thereon. The testimony of Schaefer and his witnesses, as well as that of the Macris and their witnesses, clearly establishes that there was never any new agreement between these parties after the original subcontract was entered into. Schaefer refused specifically to take over the fine grading and the excavating and the other work that was to be done by the Macris. Schaefer admittedly continued to complain throughout the entire job. Obviously, he would not have done so if he had been proceeding in the performance of a new contract which had been agreed upon between the parties.

Of course, as pointed out in the briefs of Continental and the Macris, it is well settled that where there is an express contract between the parties for doing certain work, there can be no recovery therefor on implied or quasi contract. The liabilities of the parties are governed and limited by the express contract they entered into, namely, the original subcontract.

The opinion correctly holds that on the issue of Continental's liability on the payment bond the federal rather

than state law controls because involving the construction of the Miller Act. In so doing, however, this court necessarily is holding to be fundamentally erroneous the entire basis of the district court's decision as to Continental. The district court recognized that under the federal law Continental was not liable but erred in applying its view of the Washington State law. The district court said:

> "*Now, coming to the law applicable to this situation, it is of course difficult, and I am frank to say I think that the case cited by Mr. Ivy, United States vs. John A. Johnson and Sons,* 65 F. Supp., page 527, *if it were followed, would preclude recovery by Mr. Schaefer, at least against the bonding company.* However, it is my view that in these cases, although *there is involved the construction of the Federal statute, the Miller Act,* that nevertheless, so far as the substantive rights are concerned, that *the law of the state* is entitled to first consideration." (R. 2215).

But since this court has now determined, and clearly correctly so, that as to Continental the state law should be disregarded and the federal law controls, we submit that under the federal decisions cited in our opening brief there is here clearly no liability of the surety.

The one reason stated in the opinion for attempting to distinguish those federal decisions is that there there was no agreement of the parties for the performance of additional work and for the payment therefor. *But neither was there any such agreement between these parties in the instant case.* Macri, to be sure, endeavored to make such

an agreement, but the testimony of all of the witnesses on both sides of the case clearly establishes that *no* such agreement was ever entered into *by both parties.*

The opinion quotes the Friestedt case, 125 F. 2d 1010:

> *"What was done was not required by any of the terms of the contract, but became necessary because of an alleged breach of the contract because a contractor violated one of the terms of the contract."*

But we respectfully submit that far from distinguishing the Friestedt case, this shows that the same is directly in point and should be followed here. Most or all of the work for which Schaefer is now attempting to recover, such as excavation work and fine grading, Schaefer was not obligated under any contract, either a new agreement or the original subcontract, to perform. Schaefer's whole case is predicated upon the basis that this was work that Schaefer was not obligated by the contract to do, but that it became necessary for Schaefer to do so because of Macri's alleged breaches of the subcontract. If, as Schaefer contends, the obligation rested upon Macri and not Schaefer to do these things, then clearly they were done by Schaefer not because he was under any contractual obligation to do so but because Macri breached his (Macri's) contractual obligation to do so. We submit that the Friestedt and other authorities cited by us are directly in point and should be followed here.

The only case cited in support of the decision as to Continental is "*Cf. John A. Johnson and Sons v. United States,* 153 F. 2d 534 (Cir. 4)." But that case, we submit, does not in any way support this far reaching decision. That case has never been even cited by Schaefer's able counsel. In that case the contractor and surety appeared together jointly by the same counsel. The surety did not even appear separately and did not urge any separate defense of non-liability under the bond apart from the contractor. There the prime contractor wrongfully (due to error of the government engineer) required the masonry subcontractor to tear down a portion of his completed work and rebuild the same using more expensive brick. It was definitely indicated that the prime contractor would be able to recover over from the government additional compensation therefor. *Every act of the subcontractor in that case was done in performance of his obligations under the original subcontract to construct the masonry and brickwork on the job.* The subcontractor did not perform any work which was the obligation of the prime contractor, as in this case (under the court's findings).

Strange as it may seem, the cited case praises highly, quotes, and affirms the decision of Judge Coleman in *United States v. John A. Johnson and Sons,* 65 F. Supp. 514, 526-532, which is one of the principal authorities relied upon by us herein. Even the district court, Judge Driver, stated,

as hereinabove quoted, that *that decision could not be distinguished, and that, if followed, it would require a dismissal of this action against Continental.* He declined to follow it solely for a reason (that state law controlled) which, as held in this court's decision, was wholly untenable. This court's opinion does not even mention, cite, or attempt to distinguish Judge Coleman's decision upon which we rely. It can not be distinguished. The same was so clearly sound that, although a large sum was involved, the subcontractor, Friedman, did not even appeal therefrom—and did not even cross-appeal therefrom when his opponents appealed from the portion thereof adverse to them.

The situation was that Friedman asserted two claims. Judge Coleman held in his favor as to the first, which was affirmed on appeal (in the case cited by this court) and in favor of the surety upon the second, which was so clearly correct that it was not even appealed from. In other words, even though Judge Coleman's decision was in accord with the decision of the Court of Appeals affirming the same, as to Friedman's first claim, that was entirely consistent with his decision denying recovery against the surety upon Friedman's second claim.

Schaefer's claim here is clearly of the same nature as Friedman's second claim, but entirely different than Friedman's first claim, the only one involved on the appeal.

The decision on appeal, cited by this court, was thus completely distinguished for us in advance by Judge Coleman's decision.

The distinction between the two questions was clearly and irrefutably pointed out by Judge Coleman in the following language:

> "We are not unmindful of the fact that, in another part of this proceeding we have allowed this same subcontractor to recover from the general contractor on a counterclaim for extra material and labor he had furnished, on the ground that there was an improper rejection by the general contractor of the material originally supplied. That is to say, we held that the subcontractor was entitled to be paid what this improper rejection had cost him, due to replacing the material with material of higher grade.
>
> "Such counterclaim, it is true, was based upon breach of contract in the sense that the general contractor had not lived up to his part of the agreement in so far as a duty to inspect the material, originally supplied, was imposed upon him in the first instance. However, by the express terms of the last paragraph of Article IV of the subcontract,, which we have previously quoted, the subcontractor and not the general contractor was required to replace the material when ordered so to do by the general contractor, without prejudice to the right given him by the subcontract to have a later determination as to whether or not he should have reimbursement, for any additional expenditures as a result of such replacement. So it will be seen that the performance by the subcontractor, upon which he has based his right of recovery, was *performance such as was expressly required of him by the contract for which, and only for which he could recover under the payment bond* which we have heretofore analyzed;

whereas, in the present case, there is the distinction that the subcontractor has not supplied labor and materials which he was, in fact, ever required to supply by the terms of the contract. Thus, *the subcontractor's present counterclaim is for damages as such, resulting from the general contractor's alleged breach of the contract, although it is true the alleged damages are measured by the cost of labor and materials to the subcontractor which the general contractor, if any one, should have supplied but did not. The distinction is more than a mere technical one. It is a legal distinction required by the very terms of the documents by which the subcontractor is restricted in this limited, statutory proceeding . . . .*

"The distinction between the two questions is real, not fanciful."

Referring to the second counterclaim, which was very similar to the Schaefer claim here, upon which recovery against the surety was denied, Judge Coleman said:

"The substance of the second counterclaim is that the general contractor, although having expressly agreed to provide temporary construction of every nature, necessary to the completion of the work on the project by the subcontractor within the specified time, including the providing of access to the construction site, the general contractor nevertheless failed to provide such access and that, *as a result, the progress of the work by the subcontractor was materially interfered with and delayed, thus greatly increasing the cost to the subcontractor,* whereby he was damaged in the sum of $13,740.01. . . .

"Coming, then, to the motion to dismiss the other counterclaim of the subcontractor Friedman, the basic question here is whether under the Miller Act a subcontractor may recover damages against a general con-

tractor and his surety on a *claim which is directly predicated on a breach of contract by the general contractor and not on the furnishing of labor and material by a subcontractor pursuant to contract.*

"That this is a suit by the subcontractor for such breach of contract by the general contractor seems clear. . . .

"To repeat, we think a distinction must be made between doing work which is of an extra or additional character, or reasonably implied by the terms of the contract *as part of the obligation of the subcontractor,* and work which, *as in the present case not he but the main contractor alone is, by the very terms of the agreement, required to do. The distinction is, in a sense, narrow and technical, but it goes to the very essence of the restricted rights given by this special statute, the Miller Act.* We are not unaware of the fact that there are numerous decisions to the effect that a liberal construction must be given to the Miller Act and its predecessor, the Heard Act. . . *But the liberality of construction referred to in those decisions is not meant to go so far as to extend the scope of the Act and to embrace a claim for damages such as the present one.* . . .

"Finally, it may reasonably be argued from the dearth of authorities on this precise question, that, *in line with the Friestedt case, it has been generally conceded that this type of claim was not cognizable* under either the Heard Act or the Miller Act. But however that may be, *both the weight of such authority as exists, and logical interpretation of the statute, require the conclusion here reached.*"

Thus we have the unusual situation where *the court itself at the time of deciding the two controversies expressly distinguished the one from the other.* The cited decision

of the court of appeals is therefore clearly distinguishable, and has, we submit, no applicability here.

No other authority is cited in the opinion as even tending to support this far reaching decision holding the surety liable for this huge sum.

The opinion, as we read it, agrees with our contention that a surety under the Miller Act is not liable for damages for breach of a subcontract by the prime contractor. The opinion, however, declines to apply that well established principle, apparently on the ground that this is not a claim of that nature.

The opinion quotes a portion of one of the district court's findings and then says "it does not appear *from this finding* that the amount of the judgment included damages for breach of contract." (All italics are ours).

We submit, however, that a careful consideration of (1) the findings as a whole, and (2) the opinion of the trial court, and (3) the evidence herein, and each of them, can leave no doubt whatever but that, while under the ingenious form and guise of quantum meruit, the judgment herein was, either in whole or at least in large part, actually for damages for Macri's alleged breaches of the subcontract.

It is true here, as stated on page 5 of the opinion in

referring to *City and County of San Francisco v. Transbay Construction Co.*, 134 F. 2d 468 (Cir. 9):

> "*The nature of the claim, although on the theory of quantum meruit, was really for damages,*" etc.

That is precisely the situation here.

The Transbay case is directly in point and conclusive herein.

This has at all times been clearly recognized and conceded by Schaefer and his counsel. For example, at page 4 of appellee's brief he states:

> "On the other hand, *Schaefer's claim against Macri Company, and the Continental Casualty Company as their surety, is based upon the continuing wilful failure of Macri Company to perform adequately and within a reasonable time the obligations imposed upon it by the subcontract.*"

If the single finding quoted in the opinion were deemed contrary to the proposition that the recovery herein included damages for breach of contract by the Macris, the same would be clearly erroneous, unsupported by the evidence, contrary to the evidence, and therefore clearly reversible error.

Paragraphs 12, 13, and 14 of the district court's findings of fact are as follows:

> "That it was the obligation of the defendant Macri Company to do the excavation in such a way as to afford reasonable clearance and a reasonable oppor-

tunity for the subcontractor to properly and efficiently carry out its part of the work, and that the clearance reasonably required where a form had to be placed between the concrete and the bank required an excavation of 1 foot out at the base of the excavation from the outside wall of the concrete structure to be installed and a slope of one to one on the bank; that the excavation made by Macri & Company was not made in that manner but was made approximately one foot out from the base of the concrete structure and with practically vertical banks, and that the excavation was not done in a manner to give sufficient clearance, that is, there was not sufficient slope, there was not sufficient width in the excavation to enable the subcontractor to efficiently and properly construct his forms and that he was hindered in the progress of the work, and that the use plaintiff's carpenters installing the forms had to make extra excavation and that this was the rule rather than the exception in the progress of the work.

"That the defendants Macri and Company failed to do the fine grading in accordance with the lay-out plans and specifications; that it was defectively and improperly done and that in most instances the carpenters had to do the fine grading before they could install the forms and that this increased the amount of work the use plaintiff had to do and hindered and interfered with his progress of the work.

"That the defendants Macri Company failed to make the excavations on time and in an orderly sequence and manner so as to enable the use plaintiff to proceed as he should have been able to do with prompt progress of the work.

"That with reference to the lumber which the defendants Macri Company were to furnish under the subcontract on Job 1062, sufficient lumber was not furnished, it was not furnished on time and the quality

was not proper and suitable for the work intended; that much of the time there was missing some essential type of lumber so the work was hindered and delayed because of lumber not being properly furnished, not furnished in sufficient quantity and not furnished in the quality which was the minimum requirement for work of this kind.

"*That the defendant Macri Company breached their subcontract in the particulars hereinabove set forth and that said breach on the part of defendants Macri Company was willful and negligent both as to the character of excavations and fine grading and the time it was done and the amount and quality of lumber and the time it was furnished and that this breach on the defendant Macri Company's part was a continuing breach which continued and existed and persisted throughout the entire performance of said contract 1062 until the very end of its performance by the use plaintiff.*" (R. 100-102).

There cannot be any question whatever from this record but that Schaefer's entire case is predicated upon recovery for Macri's alleged breaches of the subcontract.

Appellee's brief at pages 89 and 91 sought to criticize the federal cases upon which we rely upon the ground that the courts there "fell into error" and were "mistaken in their view of the law." They did not even contend that those decisions were sound but distinguishable upon the ground stated in this court's opinion or upon any other ground. We submit that the attempted distinction thereof is untenable and unsound.

This action to recover additional compensation for what

was done by Schaefer because of Macri's alleged breaches of contract is purely and simply an action to recover damages for such breach of contract. Looking through the form to the substance and the realities of the situation, we submit that this is clearly the nature of Schaefer's claim against Continental herein.

Actually Schaefer is attempting to recover on two separate claims:

(1) Compensation for doing what was not included in the concrete work to be done by Schaefer under the subcontract but on the contrary was to be performed by the Macris, and

(2) For additional costs and expenses incurred by Schaefer in performing his own work under the subcontract by reason of delay thereof due to breach of contract by the Macris in not having proper excavation and fine grading timely completed, form labor of suitable quality available, etc.

Neither of these claims is for the full amount of this judgment. Schaefer has made no attempt to state the amount of each or either of the two claims. The judgment is for the total amount of both claims.

We submit that both of these claims constitute damages for breach of contract on the part of the Macris. Neither of them is work required to be done by Schaefer under

the subcontract if properly performed by Macris. Both are outside of the subcontract. Both are for recovery of additional compensation, by whatever name called, arising out of Macri's alleged breaches of the subcontract. (We are assuming herein for the sake of argument, but not admitting, that Macris breached the contract).

In any event, we submit that obviously the first claim herein above mentioned is purely and simply a claim for damages for Macri's breach of contract, as everything done by Schaefer thereunder was something which he was not contractually obligated to do. Could Macris have sued Schaefer if Schaefer did excavation work improperly? Clearly not, because he never entered into any contract to do excavation or fine grading work.

Manifestly, this judgment against Continental cannot be affirmed unless it can be properly held that Schaefer is entitled to recover against Continental on *both* of these two claims. We submit that clearly he is not entitled to do so.

Also, we submit that recovery of additional compensation because in violation of the subcontract Macri rendered Schaefer's work more difficult and expensive, is likewise clearly the recovery of damages for breach of contract. Certainly Schaefer should not be legally entitled to do indirectly what he cannot do directly.

Schaefer under the subcontract agreed to construct the concrete structures for an agreed contract price of $26.00 per cubic yard of concrete. Appellee's witnesses testified that if Macris had properly performed their contractual obligations, the reasonable value of Schaefer's work would have not exceeded the contract price. Certainly, therefore, the liability of the surety on the statutory bond should not exceed the said agreed contract price. Schaefer's claim is outside of rather than within his contract. It follows that the surety is not liable therefor. Schaefer's claim is directly predicated on Macri's alleged breach of contract and not on Schaefer's furnishing of labor and materials pursuant to his contract.

This is a statutory payment bond to guarantee payment of the agreed contract price (unless unreasonable) owing to laborers, materialmen and subcontractors. It is not a performance bond to guarantee performance of the subcontract by Macris. Congress never required a bond of the latter nature. If as Schaefer contends, he for any reason did work which he was not contractually obligated to do, the surety on the statutory payment bond is not liable therefor.

We therefore respectfully submit that Continental is not legally liable to Schaefer under these circumstances, that the case should be given further consideration, that

the petition for rehearing should be granted, and that the judgment appealed from should be reversed.

The undersigned attorneys for appellant, Continental Casualty Company, herein hereby certify that in their judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Respectfully submitted,

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